Case Comment: R. (on the application of Liberty) v Secretary of State for the Home Department and Secretary of State for Foreign and Commonwealth Affairs

MacLennan, S. & Foster, S.

Original citation:
MacLennan, S & Foster, S 2018, 'Case Comment: R. (on the application of Liberty) v Secretary of State for the Home Department and Secretary of State for Foreign and Commonwealth Affairs', Coventry Law Journal, vol. 23, no. 1, 23(1), pp. 105-113.

ISSN 1758-2512

Publisher: Coventry University Law School.

Investigatory Powers Act 2016 – data retention – compatibility with EU Law – order of disapplication

R (on the application of Liberty) v Secretary of State for the Home Department and Secretary of State for Foreign and Commonwealth Affairs [2018] EWHC 975 (Admin)

Facts and decision

In this case Liberty (formerly NCCL and a human rights charity) challenged the compatibility of Part 4 of the Investigatory Powers Act 2106 with both the European Union Charter of Fundamental Rights 2000 and the European Convention on Human Rights 1950. This particular review was concerned only with the challenge under EU Law and an order of disapplication of the 2016 Act was sought, an order which to the knowledge of the authors has never before been sought, let alone granted, in a UK court with respect to EU law obligations. The relevant provisions of the EU Charter were as follows:

- Article 7 - "Everyone has the right to respect for his or her private and family life, home and communications"
- Article 8(1) - ''Everyone has the right to the protection of personal data concerning him or her''
- Article 8(2) - ''Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
- Article 8(3) – ''Compliance with these rules shall be subject to control by an independent authority."
- Article 11 - ''Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers''
- Article 11(2)- ''The freedom and pluralism of the media shall be respected''

Article 51 then provides that the provisions of the Charter are addressed both to the institutions of the EU and to the Member States only when they are implementing Union law, and that they shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Finally, Article 52 provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Article 52(3) then stresses that in so far as the Charter contains rights which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental

Freedoms, the meaning and scope of those rights shall be the same as those laid down by that Convention, but that this shall not prevent Union law providing more extensive protection.

The background to the claim was that the government had previously enacted the Data Retention and Investigatory Powers Act 2014. This Act was referred to the Court of Justice of the European Union in the case of *Tele2 Sverige AB v Post- och telestyrelsen* (C-203/15) EU:C:2016:970), and in *Secretary of State for the Home Department v Watson* [2018] EWCA Civ 70 the Court of Appeal confirmed that the Act was inconsistent with EU law in two respects: because it allowed access to retained data which was not limited to the purpose of combating serious crime, and that access was not subject to prior review by a court or independent body. The 2014 Act had by that time been repealed, but the 2016 Act substantially re-enacted the 2014 Act, and in July 2017, in light of *Tele2*, both defendant secretaries of state conceded that Pt.4 of the Act was currently incompatible with EU law in those two respects. However, the Act has remains unrepealed. The claimant submitted that the court should make an order of disapplication, suspended for a specified time, to allow the government to amend the 2016 Act, whereas the secretaries of state submitted that only declaratory relief was required. The claimant also submitted that the court should refer several other questions arising under the 2016 Act to the Court of Justice.

The relevant provisions of the 2016 Act provides as follows:

- Section 61(7), which sets out the purposes for obtaining communications data, where if it is necessary to obtain the data (a) in the interests of national security; (b) for the purpose of preventing or detecting crime or of preventing disorder; (c) in the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security; (d) in the interests of public safety …
- Section 87(1) - "The Secretary of State may, by notice (a "retention notice") and subject as follows, require a telecommunications operator to retain relevant communications data if (a) the Secretary of State considers that the requirement is necessary and proportionate for one or more of the purposes falling within section 61(7), and (b) the decision to give the notice has been approved by a Judicial Commissioner."

The High Court (Singh LJ, Holgate J) held that the court had the power – under Rule 40 the Civil Procedure Rules - to make binding declarations and that there was a constitutional convention that the executive would comply despite the lack of coercive effect (*R. v Secretary of State for Transport Ex p. Factortame Ltd (No.1*) [1990] 2 A.C. 85). The Court also noted that the direct effect of some EU law and the supremacy of EU law were incorporated into domestic law via s.2 of the European Communities Act 1972, and that a binding declaration in the context of EU law was significantly different from a non-binding declaration of incompatibility, made under s.4 of the Human Rights Act 1998, with respect to compatibility of UK law with the rights contained in the European Convention.. Thus, although the UK courts could not strike down an Act of Parliament, they had a duty to disapply incompatible domestic legislation to the extent that it was inconsistency with directly effective EU law.

In the Court's view, the 1972 Act had a "constitutional character" (*R on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5), and an Act passed after 1972 was subject to that Act's legal effect. The issue in this case was the nature and extent of the incompatibility of the 2016 Act with directly effective EU law, and the incompatibility consisted of two failures to have safeguards in place. Correcting the failures required positive steps in amending legislation and there was no obligation immediately to disapply Part 4 of the Act from the moment of the acknowledgement of incompatibility. The appropriate approach was to allow the government a reasonable time to enact amending legislation. Courts in the UK had to proceed with caution: the practical implications of immediate disapplication would be enormous and potentially damage the public interest, and constitutional adjudication in which primary legislation could be challenged was relatively uncharted territory (*R (on the application of Chester) v Secretary of State fir Justice* [2013] UKSC 63 followed).

Again, in the Court's view, a provision might be absolutely incompatible with EU law, requiring disapplication to the extent of its inconsistency, but this would be the case only where the court was not required to set up an alternative scheme. In the instant case an alternative scheme of data retention and appeals would be required and therefore the court would not immediately disapply Part 4 of the Act. The appropriate remedy, therefore, was a declaration, not an order of disapplication. A coercive remedy was not necessary, especially in a delicate constitutional context where the government proposed to introduce amending legislation. The secretary of state had conceded the incompatibility and in the Court's view it would be reasonable for the inconsistency to be remedied by 1 November 2018 (6 months from the date of the judgment).

As to the substantive issues, the Court firstly held that no CJEU reference would be made as to whether retention for national security purposes fell outside EU law. That issue, in the Courts' view had been squarely raised in an existing reference by the Investigatory Powers Tribunal and no further reference was required. Further, the issues regarding retention of data within the EU and notification of persons abroad when data was retained should both be stayed pending the CJEU reference by the IPT.

With respect to the complaint of indiscriminate retention of data (apart from those aspects which were conceded to be incompatible), the Court noted that Member States were permitted to adopt legislation permitting decisions for the targeted retention of data which was sufficiently connected with the objective being pursued, strictly necessary, and proportionate. Part 4 of the Act did not require or permit a general or indiscriminate retention of data: it did not require telecommunications operators to retain data, but rather it gave the secretary of state the power to require it of them, but only where necessary and proportionate for a listed purpose laid down in s.61(7) and that a retention notice could not exceed 12 months. Further, s.88(1) laid down factors to be considered prior to issuing a retention notice and a notice had to be approved by a judicial commissioner under s.80; a telecommunications operator could also ask for review of the notice.

The Court also held that the fact that the 2016 Act did not impose a seriousness threshold on a permissible objective for requiring data retention did not make it incompatible with EU law or the decisions in *Watson* and *Tele2*. In the Court's view,

the degree of seriousness was dealt with by applying the necessity and proportionality tests in the 2016 Act.

Analysis

The case raises a number of interesting issues with respect to the compatibility of the state's investigatory powers with human rights' law, the supremacy of EU law, and the constitutional and legal powers of the courts in providing redress when UK legislation is found to be inconsistent with EU Law.

With respect to the control of such law by human rights' norms, the European Court of Human Rights has always insisted that such practices are carried out with proper legal safeguards which restrict their use and which provide the individual with a remedy in cases of their illegal use (*Klass v Germany* (1978) 2 EHRR 214). Thus, the power to carry out surveillance etc. must be 'in accordance with law' and the domestic legislation must have inbuilt safeguards against abuse **(***Malone v United Kingdom* (1984) 7 EHRR 14**).** The passing of the Investigatory Powers Act 2016 has given rise to concerns over the control of arbitrary use in this area, particularly in respect of the powers of bulk collection and data collection; and in addition to the present case and the challenge in *Watson*, these powers will be subject to challenge before the European Court of Human Rights (*Big Brother Watch v United Kingdom* (Application No. 58170/13) on the grounds that such collection and retention should be for limited purposes (serous crime) and that such data should be subject to access requests.

Despite the European Court's insistence that such activities have a clear legal basis, it will afford a member state a good deal of discretion when adjudicating upon the necessity and proportionality of such measures. Thus, in *Klass***,** the Court accepted that such techniques were vital in protecting societies from sophisticated forms of espionage and terrorism and that states are in general justified in resorting to such methods. Thus, the Court's fundamental concern is with procedural safeguards rather than challenging the necessity of individual measures and their application **(***RE v United Kingdom*, decision of the European Court of Human Rights, 27 October 2015). The Court also validated UK in *Kennedy v United Kingdom***,** *The Times***,** 3 June 2010, where it held that the laws on interception were sufficiently clear and that the appeal proceedings before the Investigatory Appeals Tribunal maintained a fair balance between the rights of the applicant and national security. In contrast, in *Liberty and others v United Kingdom* (2009) 48 EHRR 1, it was held that the law had failed to set out in a form accessible to the public any indication of the procedure to be followed for examining, sharing, storing, and destroying intercepted material, and was thus in breach of Article 8 ECHR.

The provisions in question in the present case revealed an incompatibility in both procedural and substantive terms: the lack of prior review, and the failure to limit the powers in connection with serious crime. These issues were concede by the government as being incompatible with both EU law and the ECHR, so there was little contentious about the present decision in terms of balancing European human rights with public safety.

The real interest in the decision therefore is in respect of the failure of the Court to disapply Part 4 of the Act, and instead to merely grant a declaration that the provisions in question were incompatible with the rights in the EU Charter.

As the Court correctly pointed out, an application to disapply the Act as being incompatible with EU law is fundamentally different than a declaration of incompatibility under the Human Rights Act 1998. Under the Human Rights Act, domestic courts are not allowed to strike down or disallow primary legislation that cannot be reconciled with the rights laid down in the Convention. However they are allowed, under s.4 of the Act, to declare both primary and secondary legislation incompatible with the substantive rights of the European Convention. Thus, where the court has not been able to use its powers of interpretation under s.3 of the Act to allow the Act to be read as compatible with the Convention right, it may declare such legislation as incompatible with the relevant Convention right(s). However, unlike EU Law as incorporated by the European Communities Act 1972, the law of the European Convention and the decisions of the European Court of Human Rights are not regarded as supreme, and the 1998 Act reflects such in the powers given to the courts in the interpretation and application of Convention rights. Furthermore, it is a well established principle of EU Law that domestic courts must provide remedies that are "adequate and effective" (Case 14/83, *Von Colson* [1984] ECR 1891). This efficacy principle formed the basis of the ECJ's decision in Case C-213/89, *Factortame (no 2)* [1990] ECR I-2433, upon which basis the House of Lords had to create a remedy where none had previously existed, specifically, an injunction against the Crown from giving effect to an Act of Parliament.

Nevertheless there is a similarity of approach in respect of the Court's refusal in *Liberty* to use EU law to disapply the 2016 Act, and the courts' approach in some cases under the Human Rights Act in determining whether or not to grant a declaration. Thus, the courts have refused to grant a declaration of incompatibility if to do so would pre-empt any legislative change. Thus, in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, the Supreme Court refused to grant a declaration of incompatibility with respect to s.3 of the Representation of the People Act 1983, which disenfranchised convicted prisoners. The government had conceded that the ban was inconsistent with the right to vote, but in its consultation document it had ruled out the possibility of allowing post–tariff life sentence prisoners the right to vote; the specific claim made by the prisoner in this application. The court, thus, refused to consider granting a declaration until any statutory provision to comply with the European Court's ruling was in place; otherwise the parliamentary process would be interfered with. In the Court's view, it was clear that the ban on Chester's voting rights would be maintained by Parliament, whatever amendments it might make in the future, and more generally, it was for Parliament to consider the future position of voting rights, and the instant court had no further role in challenging that legislation or affecting any change in the law. A similar reluctance is shown when courts are asked to re-interpret legislation that is clearly incompatible with European Convention rights, but which needs amending after due consideration by Parliament as to the best way to comply with the Convention and

In the present case, the Court noted that although a provision might be absolutely incompatible with EU law, requiring disapplication to the extent of its inconsistency, such a measure would only be taken where the court was not required to set up an alternative scheme. In this case, as an alternative scheme of data retention and appeals would be required in amending the 2016 Act, the court, therefore, refused to disapply the Act with immediate effect, and instead issued a declaration which gave the

government 6 months to make the necessary amendments to the law, via the parliamentary process. It is clear, therefore, that under both the Human Rights Act and EU Law, the courts can take into consideration the constitutional issues involved in challenging incompatible legislation.

It is arguable that the decision to grant declaratory relief only could be justified on the basis that the direct effect and supremacy of EU Law automatically renders the Act invalid and unenforceable insofar as it is incompatible with EU Law. The alternative approach taken by the court arguably calls into question the nature of the supremacy of EU Law in the UK. While domestic courts in EU Member States have long taken a more circumspect view of the supremacy of EU Law than the CJEU (BVerfGE 73, 339 2 BvR 197/83 (*Solange II*)), the decision of the Court in the instant case takes a more restrictive view of the supremacy and direct effect of EU Law than any decision since the UK's accession to the European Communities in 1973.

Conclusions

The decision by Liberty to seek an order of disapplication remains a curious one. As the sections of the 2016 Act at issue created only vertical legal effects Liberty could have sought injunctive relief against the Secretary of State and the relevant public bodies, in a similar vain to *Factortame (no 2).*

Furthermore, the Court's approach to recognising the supremacy and direct effect of EU Law, which was designed to avoid "chaos" creates, instead, considerable ambiguity.